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In the Supreme Court of the United States

OCTOBER TERM, 1972

No.

UNITED STATES OF AMERICA, PETITIONER

v.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY AND THE UNITED TRANSPORTATION UNION, SUCCESSOR TO THE BROTHERHOOD OF RAILROAD TRAINMEN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on rehearing *en banc* (UTU App. A)[1] is reported at 464 F. 2d 301. The opinion of the original panel (U.S. App. A) is not officially reported. The opinion of the district court (UTU App. B) is reported at 52 F.R.D. 276.

[1] "UTU App." refers to the Appendix to the petition of the United Transportation Union in No. 72-393; "U.S. App." refers to the Appendix to the United States' brief in opposition to that petition.

JURISDICTION

The judgment of the court of appeals on rehearing *en banc* (U.S. App. B) was entered on June 13, 1972. On September 7, 1972, Mr. Justice Blackmun extended the time for filing this petition to and including November 10, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals, after finding that the respondents, pursuant to agreement and practice, had discriminatorily assigned blacks to the job of train porter and excluded them from assignments as brakemen, erred in failing to require the respondents to allow such blacks to exercise as brakemen their full seniority previously accrued as train porters.

2. Whether the court of appeals erred in denying back pay, as compensation for the financial harm suffered by the victims of respondents' discriminatory practices, on the ground that the record did not show bad faith conduct by the respondents.

STATUTES INVOLVED

1. Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–2(a), provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

2. Section 703(c) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–2(c), provides:

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

3. Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–5(g), provides in pertinent part:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative

> action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). * * *

4. Section 707(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–6(a), provides in pertinent part:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States * * * requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

STATEMENT

This action was brought by the United States pursuant to Section 707(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–6(a), alleging that the respondent St. Louis-San Francisco Railway Company (Frisco) and the respondent Brotherhood of Railroad Trainmen (BRT), which was succeeded by the United Transportation Union (UTU), were engaged in a pattern and practice of discrimination against black train

porters in violation of Title VII. Trial was held in June 1970, and on March 9, 1971, the district court held there had been no violation of Title VII and dismissed the action (UTU App. B; 52 F.R.D. 276).

On appeal, a divided panel of the court of appeals affirmed the district court's denial of all relief (U.S. App. A). On rehearing, the court of appeals *en banc* (with three judges dissenting) reversed and granted partial relief, but refused to grant full seniority relief and denied any back pay (UTU App. A).

1. *The basic facts.*[2] Frisco's job classification of train porter had been filled solely by blacks from at least as early as 1918 until 1967, when passenger train service was discontinued. Train porters were paid lower wages than brakemen, except for a period during and shortly after World War I, when the railroads were under the control of the federal government. (UTU App. A, p. A3.) Train porters performed head-end braking duties on passenger trains, and also assisted passengers, handled baggage, and kept coaches clean. Brakemen performed rear-end braking duties on passenger trains, and braking duties on both ends of freight trains. (UTU App. A, p. A4.)

From 1928 until 1966, no blacks were hired as brakemen (except in April 1965 when a former train porter made one student trip as a brakeman before electing to revert to train porter) (UTU App. A, pp. A3–A4; R. 695). From 1928 to 1949, the policy of excluding blacks

[2] The basic facts were not disputed. The evidence was in conflict as to the proportion of time train porters spent doing braking work (see UTU App. A, pp. A5, A17, n. 13).

from jobs as brakemen was embodied in a collective bargaining agreement between Frisco and the BRT. The agreement provided that "only white men" could be hired for train, engine, and yard service except for the job of train porters. Although this provision was rescinded in 1949, the policy continued unchanged: from 1949 to 1966, some 750 white men and only no blacks (other than the train porter referred to above) were hired as beginner brakemen. (UTU App. A, pp. A4, A8–A9.)

When Frisco discontinued passenger service in 1967, the position of train porter was abolished. The white brakemen who had been performing rear-end duties on passenger trains were allowed to use their full brakeman's seniority to compete for brakemen's positions on freight trains. By contrast, the 52 black train porters, although allowed to bid for positions in other classifications including brakeman, were not allowed to retain any of the seniority they had earned as porters. Less than half of the porters took such positions because of the loss of seniority and the resulting lack of job security (UTU App. A, p. A7).[2]

2. *The decision of the court of appeals.* The court *en banc* ruled that blacks hired into the operating department of the railroad had been systematically excluded from assignment to brakeman jobs and assigned only to jobs as train porters from 1928 until 1966, on the basis of their race. The court also ruled

[2] As in most industries, a railroad employee's seniority determines his order of future promotion, demotion, lay-off, and recall, as well as his right to shift and vacation assignment (UTU App. A, pp. A6, A9–A10; Pl. Ex. 1).

that the classification seniority system, as applied to train porters, perpetuated the effects of this discriminatory assignment pattern by preventing blacks from using their accumulated train porter seniority in brakeman jobs. This perpetuation of the effects of past discrimination, the court held, is not justified on the basis of business necessity and therefore violates Title VII. (UTU App. A, pp. A8–A13.)

The court set forth guidelines to be followed by the district court on remand in fashioning a remedy. On the issue of seniority, the guidelines provide that train porters who qualify for and are assigned to jobs as brakemen must be credited with 50 percent of their seniority previously accrued as train porters (UTU App. A, p. A17). As to back pay, although the court found that train porters had at all material times been paid less than brakemen, and that in 1967, when the railroad discontinued passenger service, the white brakemen who did braking work on the back end of passenger trains were allowed to exercise their full seniority to obtain freight braking jobs while the black train porters were not allowed to exercise their seniority on any other job, the court (with Judges Heaney and Lay dissenting on this issue) specified in the guidelines that no back pay is to be awarded to the train porters (UTU App. A, p. A18).[4]

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[4] Although the court of appeals specified that the district court should "take additional evidence pertaining solely to the remedy to be fashioned" (UTU App. A, p. A15), it is clear that with respect to the seniority and back pay issues further evidence and argument is foreclosed by the mandatory "guide-

REASONS FOR GRANTING THE WRIT

The decision below denies to black victims of racially discriminatory employment practices the full company seniority necessary to place them on an equal footing with their white contemporaries and the back pay necessary to make them whole. While the courts are invested with a measure of discretion in fashioning remedies for Title VII violations (see Sections 750 (a) and 706(g), *supra*, pp. 3–4), that discretion must be exercised in accord with the purposes of the Act and, in our view, it was therefore improper for the court here to require only 50 percent seniority carryover and to deny back pay. Moreover, its reasoning on these remedial issues is in conflict with the decisions of all the other courts of appeals that have ruled on the questions. Review by this Court is needed to resolve the conflicts concerning these recurring issues of importance to the enforcement of Title VII.[5]

1. In *Griggs* v. *Duke Power Co.*, 401 U.S. 424, this Court held that an employment practice that preserves the effects of past discrimination, and thereby operates

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lines" in the opinion. It is, therefore, appropriate to review these issues now, without awaiting the formalities of remand, entry of order, and affirmance.

[5] The defendant United Transportation Union has also petitioned for a writ of certiorari from the decision of the court of appeals. *United Transportation Union* v. *United States*, No. 72–393. That petition raises the question whether the court of appeals erred in holding the job classification seniority system unlawful as to blacks who had been assigned to the train porter classification on the basis of their race. The decision below on that issue is in accord with the decisions of all the other courts of appeals that have considered it, and review by this Court is not warranted. The government, accordingly, is opposing certiorari in No. 72–393.

to the disadvantage of black or other minority employees or applicants for employment, is unlawful under Title VII unless that practice is required by business necessity. Neither the presence of a business purpose nor the absence of a racially discriminatory motive is sufficient to render such a practice lawful. 401 U.S. at 431–432.

Accordingly, each court of appeals that has ruled on the issue has held that a job classification or departmental seniority system is unlawful under Title VII as applied to workers who were denied entry, because of their race, to traditionally white jobs or departments.[6] This is so because such a seniority system perpetuates the effects of the past discrimination by making the victims of that discrimination permanently junior, for purposes of promotions, layoffs, shifts and transfers, to all the workers already in the higher opportunity, traditionally white jobs or departments. In such cases, the courts have held, a seniority system based on job classification is not required by business necessity because seniority based on length of service with the company ("company" or

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[6] *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652 (C.A. 2); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791 (C.A. 4); *Griggs* v. *Duke Power Co.*, 420 F. 2d 1225 (C.A. 4), reversed on another issue, 401 U.S. 424; *Local 189, United Papermakers* v. *United States*, 416 F. 2d 980 (C.A. 5), certiorari denied, 397 U.S. 919; *United States* v. *Jacksonville Terminal Co.*, 451 F. 2d 418 (C.A. 5), certiorari denied, 406 U.S. 906; *Bailey* v. *American Tobacco Co.*, 462 F. 2d 160 (C.A. 6); *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711 (C.A. 7) (sex discrimination).

"plant" seniority) is an available and workable alternative.[7]

The courts of appeals other than the court below have therefore ruled that under Title VII the victims of discriminatory employment practices must be allowed, if they are qualified, to fill vacancies in jobs from which they were formerly excluded and thereafter to use their *full* employment seniority for purposes of all future promotions, demotions, layoffs, recalls, and assignments.[8] Full seniority carryover enables blacks who have suffered past discrimination in job assignments eventually to take their "rightful" place in the job hierarchy of their employer by allowing them to exercise in the jobs from which they were excluded the seniority they would have had but for the initial discrimination.[9] Without full seniority carryover, blacks would never be able to compete on an equal basis with whites hired contemporaneously in jobs reserved for whites.

In holding the classification seniority system unlawful under Title VII, the court below recognized the authority and logic of the prior decisions. Inconsist-

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[7] *E.g.*, *Local 189, United Papermakers* v. *United States*, *supra*, 416 F. 2d at 989–990; *Robinson* v. *Lorillard Corp.*, *supra*, 444 F. 2d at 798–800.

[8] In each case cited in note 6, *supra*, such relief was ordered or sustained, except in *Bailey* v. *American Tobacco Co.*, which was decided at the summary judgment stage and which did not present the remedy issue.

[9] See *Local 189, United Papermakers* v. *United States*, *supra*, 416 F. 2d at 988; *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va.); Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 Harv. L. Rev. 1260 (1967).

ently with this recognition, however, the court directed a form of relief that would continue in half measure the discriminatory effects of that seniority system. Thus, to the extent that the full brakeman seniority of any white exceeds 50 percent of a black train porter's seniority, the black as a brakeman would always be laid off ahead of and recalled behind the white even though the white may have worked for the railroad for a shorter time. Likewise, a junior white would always have a preference in train and shift assignments, and in days off and vacations, over every black who had not acquired as a train porter more than double the seniority acquired by the white as a brakeman. This result—in effect a seniority system that is 50 percent unlawful—is inconsistent with that reached in each of the prior court of appeals decisions on this issue.[10]

The court below stated that its 50 percent carry-over remedy was based on three considerations (UTU App. A, p. A17, n. 13):

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[10] See the cases cited in note 6, *supra*. The court in *Local 189, United Papermakers* v. *United States*, *supra*, 416 F. 2d at 984–985, 989–990, affirmed a district court's explicit rejection of a proposal to combine job seniority and company seniority so as to mitigate but not eliminate the unlawful effects of the job seniority system. See 282 F. Supp. 39, 42 (E.D. La.)

Although the government opposed, and this Court denied, a petition for a writ of certiorari in the *Jacksonville Terminal* case (*supra*, note 6) after the decision of the panel in the present case, the court below had at that time granted the government's petition for rehearing *en banc* and set the case for oral argument; there was consequently no existing conflict on the issue of remedy. See the government's brief in opposition in that case (Nos. 71–1000, *et al.*, O.T. 1971), at p. 13, n. 11.

> * * * (a) the percentage of time spent by the train porters in performing braking duties, and the disputed testimony relating thereto; (b) the fact that some train porters may have preferred the work of train porter to the work of a brakeman; and (c) the fact that blacks were illegally denied the right to become brakemen from 1928 until 1966. * * *

Only the first two of these factors can be said to weigh *against* full seniority carryover, and the other courts of appeals have properly discounted their importance in fashioning an appropriate remedy. Whether the duties of the jobs to which blacks were discriminatorily assigned are the same as, similar to, or completely different from the duties of the jobs from which they have been excluded has been held to be irrelevant in deciding whether full seniority carryover should be ordered.[11] This is because the twin components of business necessity—safety and efficiency—are adequately protected by granting full seniority carryover but leaving undisturbed the employer's right to reject the assignment of any unqualified employee. See cases cited in note 6, *supra*.

Had they been given a choice when they were hired, some porters might have preferred a train porter

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[11] The similarity of the duties would be relevant in deciding whether "freedom now" relief, in the form of immediate replacement of junior employed whites by more senior unemployed blacks, should be accorded. Such relief was initially sought in this case and would have entailed a merger of the train porter and brakeman crafts with train porters transferring immediately to brakeman jobs. The court of appeals refused to grant such relief because the duties of the two jobs were not sufficiently similar to warrant it.

assignment to the higher paying job of brakeman. It is also true, however, that not all porters will now choose to become brakemen, and not all those who elect to do so will qualify. For that reason, and because race discrimination is a group phenomenon for which a group remedy is appropriate, the present inability to determine precisely which victims of discrimination would have preferred the higher paying white jobs is not a basis for denying or limiting relief. *United States* v. *Bethlehem Steel Corp., supra,* 446 F. 2d at 660.

2. The court below gave two reasons for denying back pay: (1) since the court itself declined to order that the crafts be merged with full seniority carryover, it cannot be said that the railroad's refusal to take that step voluntarily was in bad faith; and (2) it would be impossible to determine in retrospect when those train porters who are now physically unqualified to be brakemen became physically unable to perform those duties.

a. To the extent that the decision below thus makes an award of back pay under Title VII contingent upon a showing of bad faith conduct by the defendants, it is in conflict with decisions of the courts of appeals for two other circuits. *Robinson* v. *Lorillard Corp.,* 444 F. 2d 791 (C.A. 4); *Bowe* v. *Colgate-Palmolive Co.,* 416 F. 2d 711 (C.A. 7). In each of these cases, the court authorized an award of back pay, not as a punishment for malicious intent or bad faith conduct, but rather to make the victims of discrimination

whole.[12] Thus, in *Robinson* v. *Lorillard Corp., supra,* the employer and the unions argued that a back pay award was improper because there had been no specific intent to discriminate and because the state of the law was unsettled. In rejecting these contentions, the Fourth Circuit stated (444 F. 2d at 804):

> The principal answer to both points is that back pay is not a penalty imposed as a sanction for moral turpitude; it is compensation for the tangible economic loss resulting from an unlawful employment practice. Under Title VII the plaintiff class is entitled to compensation for that loss, however benevolent the motives for its imposition.

See also *United States* v. *Hayes Int'l Corp.,* 456 F. 2d 112 (C.A. 5). Cf. *Nathanson* v. *National Labor Relations Board,* 344 U.S. 25, 27.

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[12] In cases of alleged sex discrimination, the courts have given weight to the employer's good faith reliance upon state protective laws in considering claims for back pay. Compare *Schaeffer* v. *San Diego Yellow Cabs, Inc.*, 462 F. 2d 1002 (C.A. 9) (granting back pay for the period of time after an EEOC ruling that such laws were invalid), with *Le Blanc* v. *Southern Bell T. & T. Co.*, 460 F. 2d 1228 (C.A. 5), affirming 333 F. Supp. 602 (E.D. La.) (denying back pay altogether), and with *Manning* v. *Automobile Workers*, —— F. 2d ——, 4 FEP Cases 1282, 5 EPD [CCH] ¶ 7964 (C.A. 6). Under the interpretive guidelines published by EEOC and in effect from 1965 through August 1969, such state protective laws were considered consistent with Title VII. Compare 30 Fed. Reg. 14927 (Dec. 2, 1965), 29 C.F.R. 1604.1(b) and (c), with 34 Fed. Reg. 13368 (Aug. 19, 1969), 29 C.F.R. 1604.1(b). Reliance upon a published EEOC interpretation is expressly made a defense to a back pay claim by Section 713(b) of the Act, 42 U.S.C. 2000e-12(b). See 29 C.F.R. 1601.30.

There is no basis for a similar defense here, because there has been no EEOC guideline supporting the respondents' position.

In *United States* v. *Hayes Int'l Corp.*, *supra*, after ruling that the defendant company had discriminated against blacks in past job assignments and that the company's present transfer system perpetuated the discrimination, the court reversed the district court's denial of back pay for incumbent blacks, even though the court denied the specific job transfer relief advocated by the government (456 F. 2d at 119, 121). The court thus recognized that the victims of a discriminatory transfer system should not be deprived of the remedy of back pay simply because the government sought a means of correcting that discriminatory system which the court determined Title VII did not require.

b. That some of the 52 porters in the affected class may now lack the physical qualifications necessary to become a brakeman is not a basis for denying back pay to the entire class. There will be no computation problems of the type envisioned by the court below with respect to those train porters who pass the physical examination required of brakemen. Likewise, such problems will not exist for those train porters who are now brakemen (see UTU App. A, p. A7) but who did not work full time when they first became brakemen because they were not allowed to exercise any of their accrued train porter seniority.

Even where the problem of computation does exist, it is not insurmountable. Those train porters who fail the physical examination for brakemen could be allowed to demonstrate—by records of past medical examinations or by expert medical testimony, for ex-

ample—that they were physically qualified for the job during a portion of the time since the Act's effective date of July 2, 1965. If agreement could not be reached between the parties in a particular case, the matter could be submitted, possibly for referral to a master, to the district court. The factfinding process is no more imperfect in this context than in numerous others.

Other courts of appeals have correctly rejected the argument that back pay should not be authorized because it is "speculative," "burdensome," or "unmanageable" to grant such relief to a class. *Robinson* v. *Lorillard Corp., supra,* 444 F. 2d at 802–804; *Bowe* v. *Colgate-Palmolive Co., supra,* 416 F. 2d at 720–721.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972